

ZABIDI MORAD*a***v.****PP**

HIGH COURT MALAYA, KUALA LUMPUR

b

HELILIAH MOHD YUSOF J

[CRIMINAL APPEAL NO: 41-74-2002]

13 OCTOBER 2003

CRIMINAL LAW: *Printing Presses and Publications Act 1984 - Section 5(2)(b) - Possession of newspaper without a permit - Proof - Whether possession must relate to prescribed purpose - Purpose not stated in charge - Whether charge defective - Whether offence not proved or disclosed - Whether no prima facie case made out - Evidence Act 1950 s. 4(2) - Criminal Procedure Code ss. 152, 422*

c

CRIMINAL PROCEDURE: *Charge - Defective charge - Possession of newspaper without a permit - Possession simpliciter - Whether not an offence - Whether defect incurable - Whether conviction a nullity - Printing Presses and Publications Act 1984 ss. 5(2)(b), 14 - Criminal Procedure Code ss. 152, 422*

d

STATUTORY INTERPRETATION: *Printing Presses and Publications Act 1984 - Section 5(2)(b) - Natural and ordinary meaning*

e

WORDS & PHRASES: *“for any such purpose” - Section 5(2)(b), Printing Presses and Publications Act 1984*

f

The appellant was convicted of an offence of possessing a newspaper without a permit under s. 5(2)(b) of the Printing Presses and Publications Act 1984 ('the Act') and was sentenced to a fine of RM5,000 in default to two months' imprisonment. The appellant appealed contending that the charge, having only alleged possession *per se*, and not in relation to any specific purpose(s), had not only contravened the purport and requirement of s. 5(2)(b) but had disclosed no offence known to law. Such a defect, it was further argued, was fatal to the conviction. The facts further showed that the learned Magistrate, in calling for the defence, and convicting the appellant, had relied on the presumption under s. 14 the Act. This being the case, before the learned appellate judge, questions arose as to: (i) whether the charge herein was defective; (ii) whether the presumption section could properly be invoked in the circumstances; and (iii) whether upon the proper interpretation of s. 5(2)(b) of the Act the conviction was a nullity.

*g**h**i*

a Held:

- b** [1] Section 5(2)(b) of the Act not only makes it an offence to print any newspaper in respect of which a permit has not been granted or in respect of which a permit has been revoked or suspended (this means three separate offences), but also creates multiple offences, namely, any person who imports, publishes, sells, circulates or, distributes or, offers to publish, offers to sell, offers to circulate, offers to distribute any newspaper printed in Malaysia or in Singapore in respect of which no permit has been granted or in respect of which a permit has been revoked or suspended, commits an offence. In addition, there is the sub-limb that stipulates “any person who ... has in his possession for any such purpose”. This part creates another category in respect of which possession is an element.
(pp 173 g-h & 174 e)
- d** [2] The word ‘purpose’ means the reason for which something is done or for which something exists. There is therefore a requirement in sub-s. 5(2)(b) in that the offence of possession is not possession *per se* or possession simpliciter. The words ‘for any such purpose’ therein have qualified the word ‘possession’ so that ‘possession’ must be for any one of the ‘purpose’ thereof, *ie*, for the purpose of importing, publishing, selling, circulating, or distributing or for the purpose of offering to publish, offering to sell or offering to circulate. (p 175 e-g & i)
- f** [3] The condition precedent for the invocation of the s. 14 presumption is that there is evidence that a person is found to be in possession or custody or control of any newspaper contrary to sub-s. 5(1) or (2) of the Act. This shows that, on the principle of *exclusio unius alterius*, the presumption cannot be invoked for something that is not found in sub-s. 5(2)(b). It follows that possession or custody or control of a newspaper must be for the object(s) as stated in para. (a) or (b) of sub-s. 5(2) as the case may be. The presumption could not therefore have been invoked in the instant case. (p 181 g)
- g**
- h** [4] The proceedings below had shown instances of the burden of proof being reversed. An instance was when the prosecution had lent no satisfactory explanation for the failure to produce a document which would go to establish whether the appellant was the owner of the premises in question. A duty instead had been placed on the appellant to bring forth a document to substantiate the evidence of the prosecution that there was a document on the premises with the appellant’s name inscribed in it.
(pp 182 h & 183 a-b)
- i**

[5] The trial below has occasioned a failure of justice, not only for prejudicing the appellant's ability to state his case against the charge but also for its substantial non-compliance with the provisions of the Criminal Procedure Code. A retrial of a nullity is an impossibility, and that being so, the conviction is quashed and any fine paid is to be refunded. (p 188 a-b)

[Conviction quashed; Order accordingly.]

Case(s) referred to:

Chong Chee Pak v. PP [1948-49] MLJ Supp 45 (foll)

Lim Beh & Ors v. Opium Farmer [1942] 3 KY 10 ct 12 (refd)

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC (refd)

Nadimuthu v. PP [1974] 1 MLJ 20 (foll)

Ng Kim Huat v. PP [1961] MLJ 308 (refd)

Periasamy Karupiah & Anor v. PP [1993] 3 CLJ 46 HC (foll)

Pinner v. Everett [1969] 1 WLR 1266 (refd)

PP v. Ishak Hj Shaari & Ors Appeal [2003] 3 CLJ 843 FC (refd)

PP v. Ooi Seng Huat [1968] 2 MLJ 168 (refd)

Syad Akbar v. State of Karnataka AIR [1979] SC 1848 (refd)

Legislation referred to:

Criminal Procedure Code (593), ss. 152(1), (3), 422

Dangerous Drugs Act 1952, s. 37(d)

Evidence Act 1950, s. 4(2)

Federal Constitution, art. 10

Printing Presses and Publications Act 1984, ss. 5(2)(b), 14

Other source(s) referred to:

Dickerson, *Legislative Drafting*, p 81

GC Thornton, *Legislative Drafting*, p 77

NS Bindra's, *Interpretation of Statistics*, 8th edn, pp 362-363

VCRAC Crabbe, *Legislative Drafting*, p 380

For the appellant - Mohamed Hanipa; M/s Mohamed Hanipa & Assoc

For the respondent - Abdul Rani Kasim DPP

Reported by WA Sharif

JUDGMENT

Heliliah Mohd Yusof J:

The appellant in this appeal was charged and convicted under s. 5(2)(b) of the Printing Presses and Publications Act 1984 (the Act). He was sentenced by the Magistrate Court to a fine of RM5,000 and in default to a term of imprisonment of two months. The appeal is against conviction and sentence. Nine grounds of appeal were specified in the petition of appeal.

- a* Briefly the factual matrix of the case is as follows. SP1, Assistant Secretary of the Unit Kawalan Penerbitan, Kementerian Dalam Negeri, received a complaint from the public that there was in circulation in open market a newspaper “Haraki” in respect of which there was no permit in consequence of which he lodged to report (eks. P2) dated 8 of May 2001 with the Enforcement Unit of the same Ministry. The report is reproduced.

Ketua Penguatkuasa
Unit Penguatkuasa Bahagian ‘C’
Kementerian Dalam Negeri
Tingkat 12, Bangunan AMBD
Jalan Lumut
50400 Kuala Lumpur

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Tuan

Aduan Di Bawah Akta Mesin Cetak Dan Penerbitan 1984 Oleh Penerbit Dan Pencetakan Akhbar “Haraki” Berbentuk Tabloid Tanpa Permit

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Adalah saya merujuk perkara di atas kepada tuan dengan hormatnya.

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2. Saya MOHD. NOR BIN MOHD. DAUD (K/p: 1306139) adalah pegawai yang bertanggungjawab terhadap proses permohonan Permit di Bahagian ‘C’, Kementerian Dalam Negeri (KDN) ingin membuat aduan mengenai perkara di atas kepada tuan. Berdasarkan rekod yang ada, saya dapati pihak penerbit akhbar tabloid bertajuk “HARAKI” tidak ada memohon Permit dari KDN. Oleh yang demikian, saya percaya Permit di bawah Seksyen 6 Akta Mesin Cetak Dan Penerbitan 1984 tidak dikeluarkan oleh Menteri Dalam Negeri.

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3. Untuk makluman tuan juga, saya dapati akhbar berbentuk tabloid bertajuk “HARAKI” itu adalah diterbitkan oleh PENERBITAN PEMUDA beralamat 24G, Jalan 4/21D, Medan Idaman Gombak, 53100 Kuala Lumpur dan dicetak pula oleh ANGKATAN EDARAN ENTERPRISE SDN. BHD. beralamat Lot 6, Jalan Tukang 16/4, Seksyen 16, 40000 Shah Alam.

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Sekian, aduan saya, BERKHIDMAT UNTUK NEGARA

Tt:
(MOHD. NOR BIN MOHD. DAUD)
PSU ‘C3’

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The report was made since according to SP1 there was no permit and no application for a permit was traced in the registration of records. On 9 May 2000, SP2 the senior authorized officer under the Act was called up by the Ketua Unit Penguatkuasa then concerning the report. SP2 was directed to conduct a search of the premises identified in the report which address was

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24G, Jalan 4/21D Medan Gombak, 53100 Kuala Lumpur. According to SP2 having obtained a warrant of search as required by the Act, SP2 proceeded to the said premises. Having arrived at the premises at about 1pm on the same day ie, 9 May 2000 SP2 presented himself at the cashier's counter where he saw a Malay male and female. SP2 noted that the said premises was a bookshop. Having identified the purposes of his presence SP2 then said in evidence "Saya ada tanya siapakah tuan punya premis tersebut dan beliau katakan kedai itu di bawah jagaan dan kawalan beliau". SP2 identified the male Malay as the appellant in this case.

*a**b*

SP2 further found that the newspaper Haraki was found on racks in front of the premises (45 copies) and about 12 other bundles tied with plastic strings. The bundles that were tied were not wrapped. It was found upon being counted in the presence of the appellant that the total number of copies of the newspaper "Haraki" was 545. All the 545 copies were then taken away to the enforcement office.

*c**d*

According to the Records of Appeal the appellant was then charged on 22 November 2002. The charge sheet states as follows:

Bahawa kamu pada 9.5.00 jam 1.10 petang di premis Penerbitan Pemuda, 24G, Jalan 4/21D, Medan Idaman, Gombak, 53100 Kuala Lumpur di Wilayah Persekutuan, Kuala Lumpur didapati ada menjual sebanyak 545 naskah akhbar bertajuk "Haraki" yang mana permit di bawah seksyen 6(1)(a) Akta Mesin Cetak dan Penerbitan 1984 tidak diberikan oleh Menteri dan dengan yang demikian kamu telah melakukan kesalahan di bawah 5(1)(a) dan boleh dihukum di bawah seksyen yang sama Akta yang sama.

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On the date fixed for trial that is 22 January 2001 the charge was amended and reads as follows:

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Bahawa kamu pada 9.05.00 jam 1.10 petang di premis Penerbitan Pemuda, 24G, Jalan 4/21D, Medan Idaman, Gombak, 53100 Kuala Lumpur di Wilayah Persekutuan, Kuala Lumpur didapati ada memiliki sebanyak 545 naskah akhbar bertajuk "Haraki" yang mana permit di bawah seksyen 6(1)(a) Akta Mesin Cetak dan Penerbitan 1984 tidak diberikan oleh Menteri dan dengan yang demikian kamu telah melakukan kesalahan di bawah seksyen 5(2)(b) dan boleh dihukum di bawah seksyen yang sama Akta yang sama.

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As stated above there are nine grounds submitted in the petition of appeal. I find that the first ground forms the core of the appeal. Grounds number 2, 3, 4, 5 should be taken together as they are really interconnected based on the facts of the case. The first ground of appeal is "Puan Majistret yang bijaksana telah tersilap di sisi undang-undang kerana gagal memutuskan bahawa

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- a* berdasarkan kertas pertuduhan, tuduhan yang dikenakan ke atas perayu tidak mendedahkan apa-apa kesalahan di sisi undang-undang yang mengakibatkan perayu telah diprejudiskan dalam menyediakan pembelaannya.”

b This submission of the learned counsel of the appellant has been made not only during the process of this appeal but also during the hearing of the trial before the magistrate. The charge is made under s. 5(2) of the Act. Is the charge as framed in compliance with s. 152 of the Criminal Procedure Code (Act 593) or the CPC. It is argued that without a charge to inform the accused person of the offence of which he is alleged to have committed, he will be unable to prepare his defence adequately. “If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged and be prepared to answer, the charge as he best may”, *Lim Beh & Ors. v. Opium Farmer* [1942] 3 KY 10 c.t 12 per Nowis RJ.

d Part III of the Act under which s. 5 appears bears the title “Offence to print, import, publish etc. newspaper without permit”. Looking at the section that is relied upon in the case, this is not the type of offence which the law gives it a specific name eg, theft, robbery or criminal breach of trust but one which falls under s. 152(3) of the CPC such that “so much if the definition of the offence must be stated as to give the accused notice of the matter with which he is charged”. This entails a scrutiny of para. 5(2)(b) of the Act. Section 5 specifically focuses on offences relating to a newspaper. The Act also defines a newspaper in s. 2. Both sections therefore need to be examined.

f The statutory offences created under sub-s. 5(2) are multiple offences and not a single offence. Sub-section 5(1) is a general exhortatory section which prohibits a person from printing, importing, publishing, selling, circulating or distributing or offering to publish, sell, circulate, or distribute any newspaper printed in Malaysia or Singapore unless there has been granted a permit. The first part is odd. It should have stated “No person shall print in Malaysia unless there has been granted ...” Instead it starts “No person shall print any newspaper printed in Malaysia ...”

h In any case sub-s. 5(2) is again divided into two parts. The first part namely para. 5(2)(c) creates an offence where a person prints a newspaper in respect of which a permit has not been granted or in respect of which a permit has been revoked or suspended. The second part, para. 5(2)(b) creates wider multiple offences.

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In the present appeal we are concerned with the ingredients of an alleged offence created by para. 5(2)(b). Upon a perusal of the Records of Appeal I have found that the submissions made by the prosecution and the defence are poles apart as to the interpretation of s. 5(2)(b) which is crucial to ascertain what are the ingredients of an offence or offences created under that section.

The challenge to the defective form of the charge was made at the close of the prosecution case. At p. 40 of the Record of Appeal the following was stated in the written submission of the learned counsel for the appellant/accused person:

... kami berhujah berdasarkan kertas pertuduhan tersebut OKS tidak melakukan sebarang kesalahan atas alasan-alasan berikut:

(a) Seksyen 5(2)(b) Akta tersebut telah menggariskan beberapa kesalahan yang boleh dibuktikan seperti berikut:

(i) kesalahan mengimport;

(ii) kesalahan menerbitkan;

(iii) kesalahan menjual;

(iv) kesalahan menyebarkan (circulate);

(v) kesalahan mengedar (distribute);

(vi) kesalahan menawarkan untuk menerbitkan;

(vii) kesalahan menawarkan untuk menjual;

(viii) kesalahan menawarkan untuk menyebarkan;

(ix) kesalahan menawarkan untuk mengedar;

(x) kesalahan memiliki untuk tujuan di atas ((i) hingga (ix))

(b) Adalah jelas berdasarkan seksyen (5)(2)(b) bahawa kesalahan memiliki akhbar yang tidak diberikan permit tidak boleh berdiri secara sendiri. Dengan lain perkataan hanya dengan memiliki akhbar yang tidak diberikan permit tidak boleh menjadi satu kesalahan yang boleh didakwa di bawah mana-mana peruntukan Akta tersebut.

(c) Sebarang pertuduhan memiliki akhbar tanpa permit mesti dikaitkan dengan tujuan kenapakah akhbar tersebut dimiliki seperti memiliki dengan tujuan menjual, menerbitkan, mengedar, menyebarkan dan sebagainya seperti yang dibuktikan di perenggan 10 di atas.

(d) Jelas berdasarkan kertas pertuduhan pihak pendakwa hanya menuduh bahawa OKS telah didapati ada memiliki sebanyak 545 naskah akhbar

- a* bertajuk “Haraki” yang mana permit di bawah Seksyen 6(1)(a) Akta Mesin Cetak dan Penerbitan 1984 tidak diberikan oleh Menteri tanpa dinyatakan di dalam kertas pertuduhan untuk tujuan apakah OKS memiliki akhbar tersebut.
- b* (e) Jelas berdasarkan kertas pertuduhan pihak pendakwa telah gagal membuktikan bahawa OKS telah melakukan apa-apa kesalahan di bawah Seksyen 5(2)(b).
- (f) Kami menghujahkan bahawa frasa “has in his possession for any such purpose” perlu ada di dalam kertas pertuduhan supaya ia boleh membentuk satu elemen yang perlu bagi menyempurnakan satu kesalahan (to continue an element which is essential to complete the offence) dan kegagalan untuk pihak pendakwa memasukkan atas tujuan apa pemilikan akhbar tersebut telah menjejaskan keesahan pertuduhan tersebut (affect the legality of the charge).
- c*
- d* As contended by learned counsel for the appellant possession under section para. (b) has to be related to some other act for which there is a purpose.
- On the other hand I find, from the Record of Appeal as well at the appellate stage before me that the learned senior federal counsel has regretfully not submitted a convincing interpretation of the s. 5(2)(b).
- e* From the Record of Appeal (at p. 63) the prosecution gave only a cursory treatment of the interpretation of para. 5(2)(b) where senior federal counsel observed (merujuk kepada s. 5(2)(b) Akta, perkataan yang di gunakan has in his possession for any such purpose.” Perkataan “any” bermakna mana-mana satu. Oleh demikian pendakwaan menghujahkan bahawa berdasarkan peruntukan
- f* s. 14(c) Akta dan keterangan dihadapan mahkamah OKS memiliki akhbar “Haraki” tersebut bagi tujuan jualan, mengedar dan menyebarkan).
- With all due respect I find that this sweeping proposition revealed that the senior federal counsel has indeed either misconceived or misinterpreted the various limbs of sub-s. 5(2). This may have resulted in the amended charge being so framed.
- g*

Question Of Interpretation

- I will deal first with the question of interpretation. Sir Rupert Cross in *Statutory Interpretation* 2nd edn has pointed out that the words “interpretation” and “construction” are used synonymously. Francis Bennion on *Statutory Interpretation* 2nd edn states “In some of the context which we are concerned interpretation suggests itself as the most fitting word, while in others one would speak more naturally of “construction”. It is, as so often in the linguistic field, a question of “feel”. A reader may interpret anything from a single word to
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an entire Act. He or she “construes” a sentence or longer passage, but not a word by itself. Interpretation perhaps connotes, more than construction does, the idea of determining the legal effect. Construction is more concerned with extracting a grammatical meaning. But there is no hard and fast rule.”

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Again to quote Bennion, *supra*, “We are ruled by statutes so we had better learn how to apply them ... The duties and functions of the interpreter vary in every case. The one common factor is that the interpreter is always in search of the legal meaning of the enactment. This normally corresponds to the grammatical or literal meaning.”

b

Cross, *supra*, states:

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The essential rule is that the words should generally be given the meaning which the normal speaker of the English language would understand them to bear in their context at the time when they were used. It would be difficult to over-estimate the importance of this rule because the vast majority of statutes never come before the courts for interpretation. If it were not a known fact that in the ordinary case in which the normal user of the English language would have no doubt about the meaning of the statutory words, the courts will give those words the ordinary meaning, it would be impossible for lawyers and other experts to act and advise on the statute in question with confidence.

*d**e*

Lord Reid in *Pinner v. Everett* [1969] 1 WLR 1266 of 1273 expressed what is described as the plain meaning rule as follows:

In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislation that it is proper to look for some other possible meaning of the word or phrase.

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I find it necessary to delve to such an extent on the question of interpretation as the core of the appeal is pivoted on this question. What is the interpretation to be given to para. 5(2)(b) of the Act, bearing in mind the natural and ordinary meaning as explained above. Upon analysis that section in my view not only makes it an offence to print any newspaper in respect of which a permit has not been granted or in respect of which a permit has been revoked or suspended (this means three separate offence) but in addition thereto under para. (b) of sub-s. 5(2) there are multiple offences. What are these offences? They are the following:

*g**h**i*

- a** Any person who:
- (i) imports
 - (ii) publishes
- b** (iii) sells
- (iv) circulates or
 - (v) distributes or
- c** (vi) offers to publish
- (vii) offers to sell
 - (viii) offers to circulate
- d** (ix) offers to distribute any newspaper printed in Malaysia or in Singapore in respect of which no permit has been granted or in respect of which a permit has been revoked or suspended commits an offence.

e However I pause to observe that this is not the end of the offences created under that subsection. There is another sub-limb prescribed in that part which stipulates “or has in his possession for any such purpose”. This part creates another category in respect of which possession is an element. But the question is, is it possession simpliciter. The subsection does not provide “No person shall have in his possession” or “Any person shall not possess ...”. Instead it provides *inter alia* as follows:

f Any person who ... has in his possession for any such purpose ...

Again it is to be noted that the provision does not state “any person who has in his possession for any purpose”. Four words are to be given particular attention namely the words “for any such purpose”.

g The question is what is the interpretation to be given to the words “for any such purpose”. Firstly, as noted above, the words contained in para. (b) of sub-s. 5(2) does not stipulate “or has in his possession for any purpose”. Secondly, the word “any” appears four times in sub-s. 5(2). While sub-s. 5(2) may begin with the words “Any person who ...” the words “has in his possession” are followed by the words “for any such purpose” which indicates that some meaning has to be attached to the word “possession”.

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It would appear that the authors on the subject of legislative drafting has deplored the use of the words “any”. V.C.R.A.C. Crabbe on *Legislative Drafting* (at p. 380) states:

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The word any really means one or some. It does have the same meaning as a or an 'Baa, baa, black sheep, have you any wool'. Its use in legislative drafting should take due cognizance of its ordinary meaning.

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Dickerson on *Legislative Drafting* (p. 81) states that the adjective "any" should be used only when necessary. G.C. Thornton on *Legislative Drafting* (at page 77) observed "Any" is well described by Driedger as a "tiresome" word in legislation for it is very often used when a simple "a" or "an" would be better.

b

I now turn to the word "such" which the senior federal counsel has gravely omitted to refer to or even mention. Crabbe, *supra*, has given a useful guidance as follows:

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According to the concise Oxford Dictionary there are thirteen meanings of "such". They include meanings such as, the same kind or degree, or of the kind or degree already described or implied in the context, or the kind or degree sufficient to explain the preceding or following statement, and the legal jargon aforesaid, or if the aforesaid kind.

d

Dickerson, *supra* (at p. 82) also states that although the word "such" is commonly used in legislation as a demonstrative adjective (ie, as a word pointing to a particular person, object, or entity already referred to) this use is undesirable as it is a stilted way of saying something better expressed by "that", "the", "those".

e

Turning to the word "purpose" the ordinary dictionary meaning in the concise *Oxford Dictionary* 10th edn the word is "the reason for which something is done or for which something exists". In my view the existence of the words "for any such purpose" qualify the words preceding them namely the words "or has in his possession". If it is stated that there is a reason for which something is done there is therefore a requirement in sub-s. 5(2)(b) in that the offence of possession is not possession *per se* or possession simpliciter. The words "for any such purpose" qualify the word "possession" namely for any one of the aforesaid purpose that is for the purpose of importing, publishing, selling, circulating, or distributing or for the purpose of offering to publish, offering to sell or offering to circulate.

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Such being the case, the strain that is being put on that section, overloaded as it is with a compendium of offences justify the criticism of authors on the subject of legislative drafting that the use of the word "any" and "such" has indeed caused confusion. But such is the section before me.

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Having considered the matter as aforesaid I am of the view that para. 5(2)(b) of the Act does not include a provision for the offence of mere possession of a newspaper which in the present case constitutes the gravamen of the amended charge against the appellant.

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a The erroneous interpretation of para. 5(2)(b) caused a defective charge to be framed against the appellant. I find that this in turn led the magistrate to a bottomless pit. This is crystal clear and it is shown in the alasan penghakiman where the magistrate made the following finding:

b OKS dituduh melakukan kesalahan di bawah Seksyen 5(2)(b) Akta Mesin Cetak dan Penerbitan 1984 yang memperuntukkan:

Seksyen 2(2)(b):

Any person who:

c (a)

(b) imports, publishes, sell, circulates sell, circulate or distribute, or has in his possessions. For any such purpose, any newspaper printed in Malaysia or Singapore in respect of which no permit has been granted or in respect of which a permit has been revoked or suspended, shall be guilty of an offence and shall on conviction, be

d viable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or both.

2 elemen penting yang perlu dibuktikan oleh pendakwa bagi kesalahan ini ialah:

e (1) OKS memiliki akhbar bertajuk “Haraki”.

(2) Akhbar “Haraki” tiada permit penerbitan yang dikeluarkan oleh menteri di bawah Seksyen 6(1)(a) Akta tersebut.

Elemen 1

f (1) OKS memiliki akhbar bertajuk “Haraki”

g Berdasarkan keterangan SP2, beliau dimaklumkan oleh Orang Kena Saman (OKS) bahawa kedai tersebut adalah di bawah jagaan dan kawalan beliau. Menurut SP1 berdasarkan pemeriksaan premis tersebut, didapati terdapat akhbar “Haraki” di ruang premis perniagaan tersebut iaitu berada di atas rak jualan dan di atas lantai belakang berdekatan dengan kaunter juruwang di mana semuanya berjumlah 545 dan ditanda sebagai (6 (H1-H545). Akhbar ini tidak berbungkus dan mudah dilihat. Berdasarkan keterangan SD1, beliau mengaku bahawa beliau adalah pemilik premis perniagaan tersebut.

h Pihak peguambela menimbulkan beberapa isu di bawah elemen 1 iaitu:

(1) Lesen perniagaan bagi Penerbitan Pemuda adalah atas nama Encik Ahmad Lutfi dan bukannya OKS.

i (2) Pihak pendakwa di dalam kertas pertuduhan hanya menyatakan bahawa OKS telah melakukan kesalahan memiliki akhbar “Haraki” tanpa dinyatakan tujuan ianya dimiliki.

Kegagalan pihak pendakwa menyatakan secara spesifik di dalam pertuduhan tujuan memiliki akhbar “Haraki” tersebut telah memprejudiskan OKS untuk mengetahui kesalahan apa beliau dituduh dan memprejudiskan OKS bagi menyediakan perbelanjaannya.

a

Mahkamah berpendapat kedua-dua isu tersebut tidak menimbulkan keraguan yang munasabah, ini adalah kerana bagi isu (1) pihak pendakwa tidak perlu membuktikan bahawa OKS adalah pemegang lesen Penerbitan Pemuda kerana berdasarkan seksyen 5(2) Akta tersebut hanya menyebut “any person ...” Maka sesiapa sahaja yang melakukan kesalahan di bawah Seksyen 5(2)(b) boleh didakwa. OKS sendiri di dalam memberi keterangan semasa disoal balas oleh pendakwaraya memaklumkan bahawa beliau adalah peniaga buku dan pemilik premis perniagaan tersebut walaupun lesen Penerbitan Pemuda adalah milik Encik Ahmad Lutfi.

b**c**

Isu Kedua

Merujuk kepada seksyen 14 Akta Mesin Cetak dan Penerbitan 1984:

For the purpose of any proceedings under this Act any person who is found in possession, custody or control of:

d

(a) any newspaper contrary to subsection (1) or (2) of section 5; or

(b) two or more copies of any particular issue, edition or print of any publication;

e

shall be presumed, until the contrary is proved, to have in his possession such newspaper or publication for the purpose of selling, circulating or distributing.

Pihak pendakwa menggunakan seksyen 14 bagi anggapan tersebut untuk membuktikan bahawa OKS memiliki akhbar “Haraki” adalah untuk tujuan menjual, mengedar dan menyebarkan. Adalah jelas di dalam pertuduhan bahawa kesalahan adalah di bawah seksyen 5(2)(b) dan jumlah akhbar Haraki adalah 545 naskah.

f

Pertuduhan adalah jelas di mana penggunaan perkataan memiliki adalah termasuk keseluruhan maksud tersebut. Tiada wujud kekeliruan pada OKS akan pertuduhan tersebut.

g

The grounds of judgment show that while the words “Any person ...” contained in sub-s. 5(2)(b) was briefly alluded to, there was no mention of the words “any such purpose” which as explained above was essential to the charged to be framed.

h

However there is another definition to be considered. The definition of “newspaper” in the Act was also an issue before the magistrate. In s. 2 the word publication is defined to include, *inter alia*, a newspaper. So not every publication is a newspaper but a newspaper is defined as follows:

i

a Newspaper means:

(a) (i) any publication containing news, intelligence, reports or occurrences or any remarks, observations or comments, in relation to such news, intelligence or occurrences or to any other matter of public interest,

b

(ii) or any magazine

(iii) or comic

(iv) or other forms of periodical

c

(b) printed in any language and

(c) for sale or free distribution and

(d) at regular or irregular intervals.

d

In this section the word “periodical” is not defined, but, the ordinary diction of “periodical” means a paper, magazine or journal which is repeated or which is cyclical or seasonal. *The Concise Oxford Dictionary* (10th edn) gives the meaning of “periodical” as occurring at intervals (of a magazine or newspaper) published at regular intervals that is a periodical magazine or newspaper. A newspaper is defined as a printed publication typically issued daily or weekly.

e

The definition of the word “newspaper” has also contributed a certain degree of incongruity of approach. This is reflected by the magistrate who stated:

f

Mahkamah merujuk kepada seksyen 2 terjemahan “newspaper” yang mana akhbar ‘Haraki’ adalah termasuk kategori “newspaper” dan jelas bahawa ia tiada syarat bahawa ia perlu berkala atau bersiri.

g

Again this stems from the contention of the senior federal counsel who in my view, oversimplified the interpretation of the word “newspaper” without any explanation as follows at p. 65 of the Records of Appeal: “Tidak kira sama ada ianya berkala atau tidak atau terbitan sekali sahaja. Akhbar Haraki tersebut termasuk dalam kategori ‘newspaper’ seperti yang ditafsirkan di bawah s. 2 tersebut”. And further on he stated “Adalah jelas berdasarkan s. 2 bahawa apa-apa penerbitan sama ada berkala atau tidak berkala, bersiri atau tidak bersiri bagi mana-mana tujuan yang diperuntukan di bawah s. 5 mesti mempunyai permit penerbitan.”

h

i

I find that the syntax in the definition of the word “newspaper” as follows:

Newspaper means:

- (a) any publication containing news, intelligence, reports of occurrences or any remarks, observations or comments in relation to such news, intelligence or occurrences or to any other matter of public interest or
- (b) any magazine
- (c) comic or
- (d) other forms of periodical.

I find that items (a), (b), (c) and (d) as stated above are within definition of newspaper. The aforesaid interpretation is on the following basis. The words “or other forms of periodical” are to be interpreted according to the *ejusdem generis* principle where to quote Bennion, *supra*, again it is stated (at p. 864) “According to well established rules in the construction of statutes, general terms following particular ones apply to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislative. To like effect Lord Campbell said that (‘where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified’. The principle as explained is thus: The most common case for the application of the *ejusdem generis* principle is where a phrase beginning with genus describing terms is concluded by wider residuary words’).”

It is observed that this principle has been applied in *Nadimuthu v. PP* [1974] 1 MLJ 20 and *PP v. Wilson* [1988] 1 MLJ 243.

Applying this principle to the present appeal in the context of the definition of “newspaper” the words “or other forms of periodical” are to be interpreted *ejusdem generis* with “newspaper”, “magazine” or “comic”. The placement of commas in that definition is questionable but I am of the view that the words “printed in any language for sale or free distribution at regular or irregular intervals” qualify not only “other forms of periodical” but also on “newspaper”, “magazine” or “comic”.

Thus under that definition a newspaper is a periodical but a periodical may be extended to other matters (eg, journals, newsletters, etc.) other than newspapers, magazines or comics but the common feature of periodicals are that they are published at intervals whether daily, weekly, monthly, etc.

In my view the rest of the words in the definition “printed in any language for sale or free distribution at regular or irregular interval” have reference to a newspaper, magazine, comic, or other periodical.

- a* In the context of s. 5 a newspaper is a publication which is repeated, cyclical or seasonal in respect of which a permit to print and publish has to be obtained.

The evidence in the present appeal shows that the publisher of the newspaper is Penerbitan Pemuda and on record no application for a permit had been submitted although subsequent to the seizure it was alleged that an application had been received on 27 June 2000. According to the Record of Appeal the following was admitted:

- b* (a) Penerbitan Pemuda did not submit an application. In fact knowledge of Penerbitan Pemuda was based on a public information.
- c* (b) SP1 could not produce evidence whether there was a repeated publication of Haraki although there was a denial that Haraki was published only once. SP1 does not know whether Haraki had been published more than once.

d SP2 admitted that after the seizure of the 545 copies of Haraki but no further publication of Haraki was found. Despite the submission of counsel for the defence no particular attention was paid to the specific words in the definition which has an effect on the charge. As a result the magistrate made a ruling that a *prima facie* case was established. The defence was called primarily based on the evidence of possession. Later when the magistrate ruled that the prosecution had established a *prima facie* case then the combined evidence of SD1 and SD2 disclosed that one Ahmad Lufti bin Othman owned the business of Penerbitan Pemuda. However D6 did disclose that the date of issue was 6 December 2000. SD2 admitted that he had a change of address. SD2 confirmed, not only, that there was no other firm known as Penerbitan Pemuda but that the appellant was not the owner. SD2 was the sole owner.

f In *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 Jemuri Sarjan CJ (Borneo) (as he then was) said:

- g* It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged.

h The evidence led by the prosecution at the end of its case established that there was seized copies of Haraki, that the appellant was at the premises where the Haraki newspapers were seized and that there was a document alleged to be seen and not produced as evidence. That document was said to be a business registration licence in the name of the appellant although it was suggested that there was another person.

i

The Presumption Under s. 14 Of The Act

In response to the defence counsel's plea that the prosecution had failed to establish a *prima facie* case the prosecution then went on to invoke s. 14. In *Syad Akbar v. State of Karnataka* AIR [1979] SC 1848 Zakaria J classified three types of presumptions, one of which is termed compelling presumptions or presumption of law which is rebuttable. This is found in s. 4(2) of the Evidence Act 1950. The Evidence Act 1950 is the general law on evidence. Section 14 is a specific provision in a specific legislation. Nevertheless the general law relating to presumption as seen in s. 4(2) would still be useful to guide how the presumption that is provided in s. 14 of the Act is to operate since the words "shall be presumed, until the contrary is proved" are found in s. 14.

But how then does the presumption operate? Two explanation are useful. In the case of *Public Prosecutor v. Ooi Seng Huat* [1968] 2 MLJ 168 Chang Min Tat J (as he then was) said:

Now as a matter of law a presumption is a statutory invention that upon the proof of a fact an inference of another fact can be drawn.

And further as explained by Thomson CJ (as he then was) in *Ng Kim Huat v. PP* [1961] MLJ 308, 309:

It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, the bare potential existence of such a presumption cannot itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising.

The condition precedent that is to be established for purposes of permitting the presumption in s. 14 of the Act to be invoked is that there is evidence to establish that a person is found in possession, custody or control of any newspaper contrary to sub-s. 5(1) or (2) of the Act. This clearly also shows that on the principle of *exclusio unius alterius* the presumption cannot also be invoked for something that is not found sub-s. 5(2)(b) namely that there is no offence of mere possession. Possession or custody or control of a newspaper must be for any or some of the objects stated in para. (a) or (b) of sub-s. 5(2) as the case may be. The presumption could not therefore have been invoked.

It is noted that while possession is also an element in s. 14, the insertion of the word "or" between "custody" and "control" indicates that if it could be established that a person is found to be in possession or custody or control (ie, in the alternative) of a newspaper contrary to sub-s. 5(1) or (2) again the

- a* presumption would only be in respect of possession for the purpose of selling, circulating or distributing. The presumption will not operate in the instances of importing, publishing, etc. and all the rest of the situation referred to in para. (b) of sub-s. 5(2). The word “found” is something that is not passive. Moreover if it is established that a person is found in possession, or custody
- b* or control of any newspaper contrary to sub-s. 5(1) or 5(2) it must be remembered that for sub-s. 5(2) there are several offences and yet the presumption would only arise for the purpose of selling or for circulating or for distributing. There cannot be an absurd situation, for example, that if a person is found in possession of a newspaper contrary to sub-s. 5(2) that it is
- c* presumed that possession is for purposes of all three namely selling, circulating and distributing (ie, lumping all three together).

- This shows that the position should not be dissimilar to drug related offences where, for example, in establishing that a person “is found to be in possession of drugs” one of the relevant or material evidence is evidence that establishes
- d* in what way the drug is connected to the person in whose possession it is found. For example the absence or presence of exclusivity in dealing with the drugs will determine whether the presumption that is invoked against the person is rebutted or otherwise. And again even for drug related cases it could be seen that the question of custody or control is also treated as a separate item under
- e* s. 37(d) of the Dangerous Drugs Act 1952 indicating that there are variable circumstances to be considered.

- However in the present appeal possession in relation to the presumption under s. 14 is possession with the object or purpose of selling, circulating or distributing. There was no evidence led to establish a *prima facie* case that is
- f* to establish that the newspapers found on the premises had a nexus with the appellant such that the possession of it, which is also to be established, has some bearing or related to any one of the purposes in sub-s. 5(2). Yet if that element of possession were to be proved the presumption would be available only for purposes of establishing that he was either selling or circulating or
- g* distributing the newspaper and not for all three. Again the failure to apply the presumption correctly is related to defect in the charge. The grounds of judgment also disclosed that the magistrate had not addressed her mind properly to the presumption and whether it had been rebutted.

h **The Burden Of Proof And Corroboration**

- It is noted that the proceedings in its totality disclosed that there were instances when the burden of proof was not only seemingly but in reality reversed. By this it means not only the burden of establishing a case but also introducing evidence. One instance was when the prosecution lent no satisfactory explanation

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for the failure to produce a document which was alleged to have established a fact which may be material that is whether the appellant was the owner. The prosecution had in this case placed on the appellant a duty to bring forth a document to substantiate the evidence of the prosecution that there was a document on the premises with the appellant's name inscribed on it. D6 which was eventually produced in evidence showed that ownership of Penerbitan Pemuda was not vested in the appellant yet this was the document that confirmed the evidence of SD2 that there was no other publishing firm. The difference in the address would still require an explanation for what purpose SD1 was said to be in custody and control of the premises, the address of which was in the charge. Moreover the application that was said to be submitted by SD1 was not admitted as an exhibit on the basis that the original had been submitted to the Minister who therefore had actually submitted the application.

The next point however is again in relation to the definition of the word "newspaper." SD3 is a departmental circular or issue in relation to an application for a permit. The relevant portion is as follows:

Apakah permit penerbitan?

Permit Penerbitan ialah satu kebenaran/keizinan yang diberikan oleh Menteri Dalam Negeri, di bawah Akta Mesin Cetak dan Penerbitan 1984 (P) 1987, kepada mereka yang menerbitkan akhbar, majalah, surat berita, buletin, dll. yang diterbitkan secara bersiri. Buku teks, novel and sebagainya yang diterbitkan sekali sahaja tidak memerlukan Permit Penerbitan.

It is not clear under whose authority D3 was issued but the document would only provide an external aid to the question whether a singular publication of a newspaper would require a permit. Some assistance would be obtained from *N.S. Bindra's Interpretation of Statistics*, 8th edn (at p. 362-363).

(iii) **Departmental Manual** – Sometimes the executive issues a Manual containing departmental instructions for administering an Act. Such a Manual is, however, not an authoritative interpretation of the statute which is binding on Courts. Departmental directions cannot in any sense control the meaning or construction of a statutory provision. Views of an official or institutional committee on its indepth study of legislation reports shall not be taken into consideration by the Court. In (*Smt.*) *Shashi Gupta v. LIC of India* AIR [1995] SC 1367, it is held that interpretation of any circular issued by Life Insurance Corporation of India should be beneficial to the policy-holder.

(vii) **Value persuasive** – Where a statute uses language of doubtful import, the action taken under it, if continued for a long course of years, may reduce uncertainty to a fixed rule. Such a construction commonly referred

- a* to as practical construction, although not controlling, is nevertheless entitled to considerable weight. It is highly persuasive. Similarly to interpret the words of an Ordinance is a function reserved to the Courts which are established for that purpose; any exposition which may be proposed by the Executive Government of a province has the weight which must always belong to the considered opinion of enlightened
- b* experience but it cannot be quoted or received as an authority by a Court of law. The rulings, interpretations and opinions of the particular agency while not controlling upon the Courts by reason of their authority, do constitute a body of experience and informed judgment to which Courts and litigants may properly resort for guidance. The weight of such a
- c* judgment in a particular case will depend upon the thoroughness evident in its consistency, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

- If this had been a charge framed under para. 5(2)(a) a question will arise whether this document is admissible to explain the intention of that provision.
- d* As observed by Bindra, an executive interpretation cannot override the true meaning underlying a statutory provision. It is also not known to what extent the practice as stated “Buku teks, novel dan sebagainya yang diterbitkan sekali sahaja tidak memerlukan permit penerbitan” does or does not clarify the position in respect of newspapers. During the hearing of the appeal I did pose the
- e* question orally what the situation would be if a publisher were to publish a newspaper once in several places and subsequently once again in some other place. Would that be cyclical or seasonal? The departmental circular would not clarify the issue. This gives rise to a degree of ambiguity.

- f* However all the points considered above could not have been given due consideration as a result of the defective framing of the charge for an alleged offence under para. 5(2)(b) of the Act. The appellant was indeed put in an onerous position owing to the undue emphasis emplaced on the element of possession.

- g* What is the effect of the defective charge. It is noted that the magistrate had more than ample opportunity to amend the charge but the evidence led by the prosecution combined with the application of the presumption clouded the issue.

- h* In this case there was not only a clear misdirection of a standard of proof but also a breach of the Criminal Procedure Code. Section 422 of the Criminal Procedure Code has therefore to be considered. I am fortunate that there is a timely decision in the case of *PP v. Ishak Hj. Shaari & Ors. Appeals* [2003] 3 CLJ 843. The judgment of the Court of Appeal, comprising five members was delivered by Mohd. Noor Ahmad JCA (as he then was) and the relevant excerpt is as follows:
- i*

The CPC is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the CPC is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the CPC and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the CPC is based. The modern trend should be to swing away from technicality and a greater endeavour should be made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused person, fair to the State and fair to the society for whose protection penal laws are made and administered ...

We prefer to approach the misdirection for the purpose of s. 422 of the CPC in this manner. To begin with, to identify the error and then to identify the provision of the CPC that has been breached and thereafter, to apply the case law in order to determine whether the error can be cured under the section by reason that the misdirection has not occasioned a failure of justice and then if, only if the error has occasioned a failure of justice to declare the trial a nullity by reason that the misdirection tantamounts to an illegality ...

And the misdirection on the standard of proof at the end of the trial involves a breach of the basic principle of criminal law, that is to say, the cardinal principle in criminal law is the duty of the prosecution to prove the guilt of the accused beyond all reasonable doubt. In short, the first breach is a breach of an explicit provision of the CPC and the second breach involves a principle of general importance in the administration of justice.

The upshot of all this is that I find myself in the position that is similar to the case of *Periasamy a/l Karuppiah & Anor. v. Public Prosecutor* [1993] 3 CLJ 46. In that case Dr. Visu Sinnadurai J (as he then was) applied the decision in *Chong Chee Pak v. PP* [1948-49] MLJ Supp. 45 as follows:

Chong Chee Pak v. PP [1948-49] MLJ Supp. 45, was one of the earliest decisions where the Court had to consider the effect of a charge which did not disclose an offence known to the law. In this case, the Accused was convicted on a charge of, "assisting in the management of a public lottery". It was held by Callow J that as there was no such offence under the then s. 4(1)(c) of the Common Gaming Houses Enactment, the conviction of the Accused was a nullity. The only offence defined by the said section were:

- a* (i) having the care and management of a place kept or used as a common gaming house;
- (ii) assisting in the management of such a place; and
- (iii) assisting in carrying on a public lottery.

b Callow J observed *inter alia* at p. 46:

... section 152(1) of the Criminal Procedure Code demands that the charge states the offence, not, I think in language from which the Accused should infer the nature of the charge, but in terms precise and accurate.

c His Lordship then continued (at p. 47):

The appellant faced trial on a charge not known to law: had it been a legitimate charge, though the facts proved another offence, I would have considered altering the charge ... Nor can I order a retrial, for the charge in the Court below being one without the law, it follows that the proceedings

d was a nullity ... a retrial of a nullity is an impossibility.

Further on the learned judge concluded:

I may add that in taking the view as I have, I have also relied on the recent Supreme Court decision in *Yap Sing Hock v. PP* [1992] 2 MLJ 714. The

e Supreme Court in refusing to amend a charge which had not adhered to the wordings of the relevant section of Penal Code observed at p. 725:

A Court in a criminal case would have generally speaking, to balance the interest of the prosecution on the one hand against those of the Accused on the other.

f On the question as to whether I should apply s. 422 of the Criminal Procedure Code, I also follow the views expressed by the Supreme Court in *Yap Seng Hock's* case. Peh Swee Chin SCJ in delivering the judgment of the Supreme Court said at p. 725:

g The error or what looks like an error in the instant case seems to be technical. Whether any Court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the Court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure

h of justice. It is a fundamental principle in our law that the prosecution has to prove every ingredient of the offence or charge beyond a reasonable doubt.

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With regard to the charge the advice of Thomson J should well be heeded wherein he observed in two separate cases as follows: **a**

In *Public Prosecutor v. Leong Yoon Meow* [1953] MLJ 36:

It is a very good working rule for Magistrates and police officers to hold that where what an accused person is alleged to have done cannot be described in the language of any statutory provision creating an offence or where it seems necessary to depart from the language of the section in framing a charge, then the probability is that no offence has been committed. **b**

In *Abdul Salam v. Public Prosecutor* [1955] MLJ 116: **c**

I do not propose to discuss the wording of that charge except to observe that had the prosecuting officer and the Magistrate given heed to the advice I have frequently given in the past to make some attempt to frame charges in accordance with the wording of the statutory provision which is alleged to have been contravened they would have realized that the case presented difficulties of which they seem to have been completely oblivious. **d**

Learned counsel has also alleged that sub-s. 5(2) of the Act read with para. (6)(1)(a) is unconstitutional. I find this allegation unnecessary to the merits of this appeal and I therefore decline to comment upon it. But it suffices to state that art. 10 cl. (1) and cl. (2) of the Federal Constitution stipulates: **e**

(1) Subject to Clauses (2), (3) and (4)

- (a) every citizen has the right to freedom of speech and expression;
- (b) all citizens have the right to assemble peaceably and without arms;
- (c) all citizens have the right to form associations. **f**

(2) Parliament may by law impose:

- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence. **g**
- h**

The question before me is not a question of the validity of the Act but a question of implementation of certain sections.

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- a* Finally, for the reasons explained above I find that there has been occasioned a failure of justice, not only on account of the appellant being prejudiced in that he has not been able to state his case against the charge but also on account of the substantial non-compliance with the material provisions of the Criminal Procedure Code resulting in misdirection. I do not consider a retrial
- b* as there cannot be a retrial for following the words of Callow J *supra* “a retrial of a nullity is an impossibility”.

The conviction is therefore quashed and the fine if paid is to be refunded.

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